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No. 00-181

In the

Supreme Court of the United States

JAMES W. WOOD,

Petitioner,

versus

PRUDENTIAL INSURANCE COMPANY OF AMERICA; JAMES W. WOOD; KAREN WOOD, individually and as Guardians of MATTHEW WOOD, incompetent v. PRUDENTIAL INSURANCE COMPANY OF AMERICA; James Wood; Karen Wood, individually and as guardians of Matthew Wood, incompetent

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Brief filed by Respondent in Opposition to the pending Petition for A Writ of Certiorari only underscores the uncertainty and confusion surrounding the application of ERISA "complete preemption" principles to facts like those presented here, and the need for this Court's clarification of those principles.

SUMMARY OF REPLY ARGUMENT

Respondents' entire Opposition Brief is predicated upon a misstatement of the question presented for review, which Respondent describes as the issue of whether an ERISA § 510 claim, which falls within the civil enforcement provisions of ERISA § 502(a), is subject to "complete preemption." See, e.g., Opposition Brief, at 6-7. But the real question presented is whether every state law age discrimination claim potentially subject to a defense of "ordinary preemption" under ERISA § 510, because it alleges a "pension-defeating" motive, can be *automatically* considered to be "within the civil enforcement provisions of ERISA § 502(a)" on that same basis, regardless of the nature of the action in which it is asserted or the nature of the relief requested. Petition at i. Once Respondent's subtle distortion of the question presented is revealed, the hollow nature of its effort to demonstrate the "uniformity" of the circuit courts on this important jurisdictional issue is immediately revealed as well.

For example, by avoiding the real question presented for review, and focusing instead upon the question as misstated in its Opposition Brief, Respondent is able to create the appearance of "uniformity", where in fact there is none, by pointing to circuit court cases which *do not even involve* either a state court claim of age discrimination, or allegations of the type of "pension-defeating" motive asserted in Petitioner's state law complaint in this case.

Respondent also contends that Petitioner's reliance upon the Sixth Circuit's ruling in *Warner v. Ford Motor Co.*, 46 F.3d 531 (6th Cir. 1995), is misplaced, because *Warner* is "fundamentally distinguishable, both factually and legally," and because *Warner* has been "implicitly overruled" by the Sixth Circuit's more recent decision in *Smith v. Provident Bank*, 170 F.3d 609 (6th Cir. 1999). Opposition Brief at 17. But these contentions are refuted by another of Respondent's own cases, *Kalo v. Moen, Inc.*, 93 F. Supp. 2d 869 (N.D. Ohio 2000), which found that a cause of action *almost identical* to the age discrimination claim asserted by Petitioner in this case was *not* subject to "complete preemption," and therefore non-removable in light of *Warner*. *Id.* at 873. This ruling actually serves to reaffirm *Warner's* continued viability in the Sixth Circuit on the ERISA "complete preemption" issue.

Moreover, rather than "implicitly overruling" *Warner* on any issue, the Sixth Circuit's decision in *Smith v. Provident Bank*, 170 F.3d 609, simply analogizes ERISA actions predicated upon alleged breaches of fiduciary duty by an ERISA fiduciary to actions seeking recovery of pension benefits, for "complete preemption" purposes. *Id.* at 613. Most importantly, however, the state law claims asserted by Petitioner here do not fall into *either* of these classifications, and for this reason clearly would not be subject to "complete preemption" under prevailing law in the Sixth Circuit pursuant to its ruling in either *Warner* or *Smith v. Provident Bank*.

By the same token, Respondent contends that Petitioner's reliance upon the Fifth Circuit's ruling in *Rokohl v. Texaco, Inc.*, 77 F.3d 126 (5th Cir. 1996) is "puzzling," because *Rokohl* was a case of "ordinary preemption," which did not even discuss the "complete preemption" issue. Opposition Brief at 19-20. What Respondent fails to mention, of course, is that its own reliance (and that of the majority in the court below), on the Supreme Court's decision in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133

(1990), is equally "puzzling" for precisely the same reason. In fact, because *Ingersoll-Rand* was an "ordinary preemption" case, even though it mentioned in *dicta* the "complete preemption" issue, there is simply no basis for the conclusion that this Court intended to apply the ruling of that decision to the entirely separate "complete preemption" issue. Respondent also fails to mention that where a defense of "ordinary preemption" is rejected, as was done by the Fifth Circuit in *Rokohl* (in a case directly analogous to the case at bar), it follows **a fortiori** that "complete preemption" would have been ruled inapplicable as well. Cf., *Romney v. Lin*, 94 F.3d 74, at 80 ("complete preemption" requires a finding of ordinary preemption, *as well as* a finding that a cause of action is "within the scope of ERISA § 502(a)").

Finally, Respondent relies heavily upon the alleged absence of "additional allegations" in Petitioner's state court complaint, to demonstrate an alternative, or "independent" basis for his state law age discrimination claim, in addition to the "pension-defeating" motive asserted. Opposition Brief, at 21. But in his state court complaint Petitioner specifically alleged that "[p]laintiff's age was a determinative factor in Defendant's harassment, and callous treatment of the plaintiff in the final year of his employment with Defendant, and in its ultimate termination of plaintiff as described herein." Petitioner's state law complaint, Opposition Brief, Appendix, at 3A, ¶ 4.

No greater specificity is required for pleading a claim of age discrimination in New Jersey Superior Court, and this Court's own recent ruling in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160 (1993), struck down efforts to require pleading specificity, beyond the "notice pleading" required by Rule 8(a)(2), Fed. R. Civ. P., for analogous civil rights claims brought under federal law. *Leatherman*, 507 U.S. at 168. It would be anomalous indeed for this Court to hold that a state law claim of age discrimination was subject to "complete preemption," and therefore completely "displaced"

by ERISA § 510, by virtue of its failure to provide the type of pleading "specificity" that would never have been required had it been filed in federal district court to begin with.

For all of these reasons, and on the basis of the Argument set forth below, Respondent's effort to forestall resolution of the uncertainty and confusion surrounding the issues presented here should be rejected, and the pending Petition for A Writ of Certiorari should be granted.

ARGUMENT

A. RESPONDENT HAS FAILED TO DEMONSTRATE THE "UNIFORMITY" OF THE CIRCUIT COURTS ON THE QUESTION PRESENTED FOR REVIEW.

Respondent cites four circuit court cases in an effort to demonstrate the "uniformity" of the circuit courts on the question presented for review. Opposition Brief, at 7. But the cases cited by Respondent are totally inapposite, because they involve facts and claims which do not even remotely resemble those presented here.

1. Respondent's Cases Do Not Demonstrate The Uniformity of the Circuit Courts On the Question Presented For Review.

First, Respondent cites *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F.3d 1212, *as amended*, 208 F.3d 1170 (9th Cir. 2000), a case seeking recovery of excessive legal fees charged *directly* to a pension plan, in a suit *filed by an ERISA plan trustee*. Unlike the instant case, involving claims with *no potential impact whatsoever* on any ERISA plan, the direct impact of the claims asserted in *Rutledge* upon the ERISA plan at issue in that case could hardly be clearer. Moreover, *Rutledge* involves no

allegations of a "pension-defeating" motive for any action taken, and no state law age discrimination claim.

Similarly, Respondent cites *Smith v. Provident Bank*, 170 F.3d 609 (6th Cir. 1999), a suit *filed by an ERISA plan, against a former plan trustee*, for recovery of plan assets allegedly misappropriated or lost, which charged that the defendant had "breached its fiduciary duty as the trustee of an ERISA plan," and "sought to clarify [a participant's] rights and recover benefits due under an ERISA plan..." *Id.* at 612. Like *Rutledge*, the claims asserted in the *Smith* case directly impact an ERISA plan, and also involve no allegations of a "pension-defeating" motive for any action taken, and no state law age discrimination claim.

As a further demonstration of "uniformity" on the question presented for review, Respondent also cites *Romney v. Lin*, 94 F.3d 74 (2d Cir. 1996), a case holding that claims brought under a New York statute specifically designed to enable employees to enforce a corporation's pension funding obligations against the corporation's ten largest shareholders, were "completely preempted" by ERISA. Like the *Rutledge* and *Smith* cases, the claims in *Romney* also directly impact ERISA plans, together with their existing or potential assets, and *Romney* involves no allegations of a "pension-defeating" motive for any action taken, and no state law age discrimination claim. Indeed, given their dramatic factual dissimilarities, Respondent's citation of *Rutledge*, *Romney* and *Smith*, in an effort to demonstrate "uniformity" on the question presented for review here is incomprehensible.

The *only* circuit court case cited by Respondent which involves allegations that are even related to ERISA § 510 is *Anderson v. Electronic Data Servs. Corp.*, 11 F.3d 1311 (5th Cir.), *cert. denied*, 513 U.S. 808 (1994). *Anderson* is also easily distinguishable from the case at bar, however, because the employee in that case was discharged from his position as administrator of pension investments totaling approximately $1.3 billion dollars, for his alleged refusal to engage in conduct with respect to these pension assets, in

violation of the ERISA statute. *Id.* at 1312. The direct relationship between the claims of the plaintiff in *Anderson* to the ERISA pension plans at issue in that case, and the potential impact of the conduct complained of in *Anderson* upon ERISA plan assets, could hardly be more obvious or more direct, and also involves a situation far afield from the facts presented here. *Id.*

In short, not only do Respondent's circuit court cases fail to demonstrate "uniformity," they fail to even touch upon the question presented for review.

2. *Warner v. Ford Motor Co.* Remains Good Law in the Sixth Circuit, And Applies Directly To The "Complete Preemption" Issue Presented Here.

Respondent also contends that the Sixth Circuit's ruling in *Warner v. Ford Motor Co.*, 46 F.3d 531 (6th Cir. 1995) is "fundamentally distinguishable, both factually and legally," and that *Warner* has been "implicitly overruled" by the Sixth Circuit's more recent decision in *Smith v. Provident Bank*, 170 F.3d 609 (6th Cir. 1999). Opposition Brief, at 17. Nevertheless, another case cited by Respondent, *Kalo v. Moen, Inc.*, 93 F. Supp. 2d 869 (N.D. Ohio 2000), directly refutes both of these contentions.

In *Kalo*, the district court considered the removability of a state law age discrimination claim almost identical to Petitioner's age discrimination claim under the New Jersey Law Against Discimination ("NJLAD") in the case at bar. The *Kalo* plaintiff's claim was based upon his allegation that "it was improper for Moen to terminate him when he was only a year away from being eligible for early retirement, and only six years away from being fully vested in his pension plan." *Id.* at 873; cf., Petitioner's state law complaint, Opposition Brief, Appendix, at 3A, ¶ 4. ("...because he was fifty-one years old, and had more than twenty years of service with Prudential, plaintiff Jim Wood was about to become eligible for full retirement benefits."). Citing *Warner*

v. Ford Motor Co., 46 F.3d 531, the district court concluded that the directly analogous age discrimination claim before it in *Kalo v. Moen, Inc.*, was not removable:

> Kalo does not dispute that the benefits referred to in his complaint are associated with an ERISA-governed plan. He argues, however, that ERISA does not displace his state age discrimination claim in light of the Sixth Circuit's decision in *Warner*. This Court agrees.

Kalo v. Moen, Inc., 93 F. Supp. 2d 869, at 873 (emphasis supplied).

Although the district court went on to determine that a public policy claim asserted by the plaintiff in *Kalo* was removable, there was no "public policy" claim asserted by Petitioner in his state court complaint in the instant case. See Opposition Brief, Appendix, 1A-10A. Thus, the ruling by the district court in *Kalo* confirms that Petitioner's reliance upon the Sixth Circuit's ruling in *Warner* to demonstrate the conflict in the circuits on the issue presented here was entirely appropriate. Cf., *Kalo v. Moen, Inc.*, 93 F. Supp. 2d 869, at 873-874. The *Kalo* court's own reliance upon *Warner v. Ford Motor Co.*, 46 F.3d 531, and its reference to *Warner* as the "leading case on complete ERISA preemption" (*Kalo*, 93 F. Supp. 2d at 872), only underscores this conclusion, and further demonstrates the manner in which the conflict among the circuits identified by Petitioner has permeated the federal caselaw.

Respondent is also wrong in its contention that *Warner* was "implicitly overruled" by *Smith v. Provident Bank*, 170 F.3d 609, in its holding that complete preemption was limited to claims falling under § 502(a)(1)(b). In fact, *Smith v. Provident Bank* simply held that claims for breach of fiduciary duty, which fall under § 502(a)(2), might also be

subject to "complete preemption," because "...we see little reason to distinguish between the two provisions. ERISA is at least as concerned with defining and standardizing the duties of a fiduciary as it is with providing for recovery of benefits." *Smith v. Provident Bank*, 170 F.3d 609, at 613. In the instant case, where no claim for breach of fiduciary duty is involved, and it is undisputed that Petitioner's state law claims did not seek "recovery of benefits," the Sixth Circuit's ruling in *Smith v. Provident Bank* has no bearing whatsoever on the issues presented, and does not negate the direct applicability of *Warner* in any way.

B. HIS STATE LAW COMPLAINT WAS NOT REQUIRED TO ALLEGE ALL POSSIBLE GROUNDS FOR PETITIONER'S AGE DISCRIMINATION CLAIM.

In its Opposition Brief, Respondent repeatedly contends that removal of Petitioner's state court complaint was justified, because he did not plead "an independent age discrimination claim." See, e.g., Opposition brief at 21.

In fact, however, Petitioner *did* plead an independent age discrimination claim, in the very FIRST COUNT of his state law complaint. See, e.g., Opposition Brief, Appendix, 1A-10A, ¶'s 1, 4, 7-9. Respondent's argument to the contrary implicitly suggests that Petitioner was required to plead his state law age discrimination claim with greater specificity, in order to avoid application of the "complete preemption" doctrine employed by the district court to completely "displace" his age discrimination claim even *before* any discovery was completed.

Nevertheless, Respondent cites no case that would require Petitioner to plead his state law age discrimination claim with greater specificity. On the contrary, New Jersey courts follow federal law on all issues relating to state law discrimination claims, and in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163,

113 S.Ct. 1160 (1993), this Court made it clear that the "notice pleading" standards of Rule 8 (a)(2), Fed. R. Civ. P., are applicable to such claims, and they cannot be subjected to heightened pleading standards. *Id.*, 507 U.S. at 168.

These pleading principles also serve to highlight the importance of this Court preserving the distinction between "ordinary preemption" and "complete preemption" in cases like this one, rather than permitting that distinction to be obliterated by "complete preemption" rulings like that of the Third Circuit here. Clearly, the completion of discovery in state court could reveal the presence of motives for age discrimination claims like that complained of by Petitioner, which are *entirely* separate and apart from a "pension-defeating" motive that may be alleged in a state court complaint. If such separate motives are *not* revealed, defendants would still be free to interpose the defense of "ordinary preemption," pursuant to ERISA § 510. However, by employing ERISA "complete preemption" principles at the pleading stage, to entirely "displace" a state law age discrimination claim *before* any discovery with respect to that claim has even been completed, the victims of such discrimination are arbitrarily deprived of *any* opportunity to prove the existence of what may be *bona fide*, and entirely independent state law age discrimination claims. Such drastic action, solely on the basis of the "reading" of complaints never intended in the first place to do more than provide "notice" of the claims asserted, by courts who can only speculate about the real facts behind such pleadings (Cf., *Wood v. Prudential*, 207 F.3d 674, at 676), can only serve to *frustrate* the interests of justice.

On the other hand, if a state law claim of age discrimination like the one presented here, which does not seek recovery of pension benefits, and has no potential impact whatsoever upon either the assets or administration of any ERISA plan, is permitted to be fully-litigated in the state court where it is filed, despite the allegation of a "pension-defeating" motive, as long as the defense of "ordinary

preemption" remains available to the defendant, the goals and objectives of ERISA will be preserved. As an added benefit, however, the goals and objectives of state anti-discrimination laws will also be preserved, along with the interests of justice not just for employers, but *for all parties concerned.*

CONCLUSION

On the basis of the foregoing, and the arguments set forth in his pending Petition, Petitioner respectfully submits that the application of "complete preemption" to Petitioner's state law age discrimination claim in this case, in light of the conflict among the circuit courts of appeal on the question presented for review, and the confusion and uncertainty regarding this issue among our federal courts in general, provides a compelling basis for this Court to grant the pending Petition, so that it can revisit the important issues raised.

Respectfully submitted,
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